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Supreme Court, U.S.
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No.85-803

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

JACK A. TURNER, ET AL.,
Petitioners

v.

CF&I STEEL CORPORATION, ET AL.,
and
NON-CONTRIBUTORY PENSION PLAN OF
CF&I STEEL CORPORATION
and
THE PENSION PLAN OF CF&I
STEEL CORPORATION
and
PROGRAM OF INSURANCE BENEFITS FOR
EMPLOYEES OF CF&I STEEL CORPORATION
OUTSIDE OF COLLECTIVE BARGAINING UNITS,
Respondents

On Petition For Writ Of Certiorari To The
United States Court of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This is an action originally brought by 216 named plaintiffs[1] against the CF&I Steel Corporation ("CF&I"),[2] two separate pension plans maintained by CF&I,[3] and an insurance plan, the Program of Insurance

1. For convenience, the parties are referred to as they were in the District Court.

2. Pursuant to Supreme Court Rule 28.1 respondents state that CF&I is not currently a subsidiary or affiliate of any other corporation. During the course of the proceedings below and until May, 1985, CF&I was a wholly owned subsidiary of Crane Company. Currently, five members of the Board of Directors of CF&I are also members of the Board of Directors of Crane Company.

3. The Pension Plan of CF&I Steel Corporation ("Master Plan") and the Non-Contributory Pension Plan of CF&I Steel Corporation ("Roebling Plan").

Benefits ("PIB"). Each of the plaintiffs is a non-union employee (or beneficiary of a non-union employee) formerly employed at the Roebling division of CF&I.

The Complaint contained six counts. In Counts I and III plaintiffs claimed that increases in pension and insurance benefits had been granted to retirees under the Master Plan, that such increased benefits had not been granted to retirees under the separate Roebling Plan and that the failure of CF&I and the plans to grant such increases to retirees under the Roebling Plan violated the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* (ERISA). Count II of plaintiffs' Complaint asserted that plaintiffs had requested certain documents pursuant to Sections 104, 105 and 502 of ERISA, 29 U.S.C. §§1024, 1025 and 1132, that such documents had not been provided and that CF&I was liable to pay a statutory penalty for the failure to provide these documents. Count IV of the Complaint requested attorneys' fees. Count V of the Complaint alleged that CF&I had interfered with the rights of Howard Maloney, one of the plaintiffs in the case. Finally, in Count VI plaintiffs alleged that by failing to grant retirees under the Roebling Plan the same increases as those granted retirees under the Master Plan defendants violated §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a). The plaintiffs demanded a jury trial.

Defendants denied all liability and moved to dismiss the Complaint for improper venue and for failure of Counts II and VI of the Complaint to state a claim. Defendants' motion was granted in part and denied in part. The District Court found that venue was proper. It ruled, however, that Count II of the Complaint which sought to impose liability for the failure to provide certain documentation failed to state a claim because liability under ERISA §502 may only be imposed upon the plan administrator against whom plaintiffs had not brought

suit. Plaintiffs' securities claims, contained in Count VI, were dismissed on the authority of *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel* , 439 U.S. 551 (1979).

Defendants later moved to strike plaintiffs' demand for jury trial. On July 15, 1981, that motion was granted.

Trial with respect to Counts I, III, IV and V of the Complaint was held from August 24, 1982 through August 27, 1982. Following trial, the District Court issued its Findings of Fact and Conclusions of Law, entered judgment in favor of defendants on all counts except Count IV and dismissed Count IV (claim for attorneys' fees) as moot. An appeal was taken by plaintiffs from the orders of the District Court striking the demand for jury trial, dismissing Count IV of the Complaint and entering judgment on Counts I, III and V of the Complaint in favor of defendants. Plaintiffs did not appeal the dismissal of their securities claims in Count VI of the Complaint.

After full briefing and oral argument the Court of Appeals affirmed the District Court. The Court of Appeals found that the plaintiffs' case with respect to increases in pension and insurance benefits turned on their contention that there was only one pension plan maintained by CF&I and that this was a factual question, resolved by the District Court in defendants' favor. The Court of Appeals concluded that this finding was not clearly erroneous and that any other finding would lack adequate support. The Court discussed the jury trial issue raised by plaintiffs and concluded, in agreement with every circuit court to consider the issue, that the jury demand had been properly stricken. This petition for certiorari followed that decision.

II. FACTUAL STATEMENT.

CF&I maintained two pension plans, the Master Plan and the Roebling Plan. CF&I acquired the John A.

Roebling Sons Corporation in 1952 and operated it until 1974 when it was closed. At the time of its acquisition, the Roebling division operated a non-contributory pension plan (the "Roebling Plan") for the benefit of its retirees. That plan was maintained by CF&I after the acquisition. At the time of the acquisition, CF&I already had a non-contributory pension plan (the "Master Plan") for its employees which it continued to maintain as a separate plan after the acquisition of Roebling.

The United Steelworkers of America ("USWA") have always represented all the union workers employed by CF&I. When the Roebling division was in operation, USWA represented the union workers employed there. This union negotiates labor agreements with all the major steel companies, beginning with some of the larger companies known as the "Coordinating Committee." These companies have agreed to be individually bound by the agreement reached through joint negotiations with the union. During the course of these negotiations wages, benefits (including pension and insurance benefits) and working conditions are agreed upon. Not only do the agreements concluded by the parties bind the companies who are members of the Coordinating Committee but they serve as a guideline for the entire steel industry. Thus, the terms and conditions of the labor agreements reached by CF&I with its unions are similar to the labor agreements reached by United States Steel Corporation with its unions. For the same reason, not only are the terms and conditions of the Roebling Plan and the Master Plan somewhat similar to each other, they are also similar to (again, as an example) the terms and conditions of the pension plan of United States Steel Corporation.

Historically, after the master labor agreements had been negotiated between the major steel companies and the USWA, CF&I negotiated in New Jersey with the local union representing the union employees at Roebling and in Colorado with the local union representing the

bargaining employees at other plants of CF&I. Agreement was reached on wages, benefits (including the terms and conditions of each pension plan and insurance benefits) and working conditions utilizing as a basis the agreements reached in the Coordinating Committee negotiations. Once the terms and conditions of each pension plan had been agreed upon between CF&I and each local union the same economic benefits were given to *non-union* employees in each pension plan by resolution of the Board of Directors of CF&I.

In 1974 CF&I announced its intention to close its Roebling locations. When labor negotiations commenced that year in Colorado, representatives of both the Pueblo, Colorado and Roebling locals appeared to negotiate. CF&I informed the Roebling representatives that the Roebling Plants would be closed, that negotiations with them would not be conducted in Colorado, and that officials of CF&I located in the east would conduct negotiations if the union wished to do so. A letter was delivered to the USWA setting forth this position.

The Roebling local never negotiated with CF&I in 1974 or any year thereafter with respect to pensions and insurance benefits. Thus, increases for union retirees in the Roebling Plan were never requested or granted. No occasion was ever presented for increases to be extended to Roebling Plan retirees who were not union members.

In subsequent years when negotiations were conducted with the Pueblo local of the USWA, increases in pension and insurance benefits for union retirees covered by the Master Plan were agreed upon. These increases were extended to non-union Master Plan retirees by action of the Board of Directors of CF&I.

Non-union employees, such as the plaintiffs in this case, were the beneficiaries of actions taken by the unions on behalf of retired union members who were participants in their pension plan. After collective bargaining resulted in increases for union retirees, CF&I voluntarily granted the same benefits to the non-union

participants in that plan. If no increases were bargained for on behalf of union participants in a plan, no increases were granted to non-union participants in that plan.

In 1974, the year the Pueblo local sought and obtained pension increases for the Master Plan retirees, the Roebling local did not bargain. It neither sought nor received any increase in pension and insurance benefits for retired union members who were participants in the Roebling Plan. CF&I treated the retired non-union members of the Roebling Plan the same as union retirees, *i.e.*, gave them no increase.

This suit was brought by Roebling retirees contending that they too should be granted increases in retirement benefits because the Roebling Plan and the CF&I Master Pension Plan were really one plan. After extensive discovery, the District Court conducted a three day trial, heard the testimony of ten witnesses and reviewed hundred of pages of documents. It concluded that the Roebling Plan and the Master Plan had been separately maintained and had separate Internal Revenue Service Determination Letters, Department of Labor Reports, Actuarial Studies and Auditors Reports. The pension documents and even filing system were separate. The Court held that as a matter of fact, there were two separate plans and not one, as plaintiffs had alleged. Accordingly, it entered judgment in favor of the defendants. On appeal, the Court of Appeals affirmed.

REASONS FOR DENYING THE WRIT

I. The Petition For Writ Of Certiorari Presents No Special And Important Reason Justifying Review Because There Is No Conflict Among The Courts Of Appeals With Respect To Whether A Plaintiff Is Entitled To A Jury Trial Under ERISA.

The Petition for a Writ of Certiorari filed herein presents no "special and important reason" supporting discretionary review by this Court. The decision of the Court of Appeals does not conflict with the decision of another federal court of appeals on the same subject and does not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Supreme Court Rule 17.1.

The Courts of Appeals for the Fourth, Fifth, Seventh and Eighth Circuits have each ruled, as the Third Circuit did in this case, that there is no right to jury trial in an action brought under ERISA. *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1983); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

Calamia v. Spivey, supra, best illustrates the approach of these courts. The plaintiff applied for and was granted a disability pension. Thereafter, pensions were increased to some beneficiaries of the pension plan but not to plaintiff who brought an action pursuant to §502 of ERISA. The Court of Appeals examined plaintiff's contention that his demand for jury trial was improperly stricken. In making this determination, the Court noted that in the first instance whether an action created by Congress carries with it the right to jury trial is a question of Congressional intent. In the absence of clear congressional intent, the courts are required to "examine the 'premerger custom with respect to such questions' looking at how similar actions were treated before the merger

of law and equity." 632 F.2d at 1237, quoting *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

In applying this test, the Court in *Calamia* determined that actions for increased pension benefits were decided by the courts under a test which asked whether the determination of the pension fund was arbitrary and capricious. Such actions were traditionally equitable in nature. Since the Court could find no indication that Congress intended to change this rule, the Court held that actions under §502 of ERISA were within the equitable jurisdiction of the court and thus no right to jury trial would be recognized. 632 F.2d at 1235. The same analysis has been followed in all of the Circuit Court decisions which have considered and rejected a right to a jury trial under ERISA.

Plaintiffs rely on two cases in support of their assertion that there is a conflict among the Courts of Appeals with respect to this issue. *Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1976), *aff'd without op.*, 622 F.2d 575 (2nd Cir. 1980); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 106 S.Ct. 183 (1985). Examination of both of these cases demonstrates that no conflict exists.

Pollock v. Castrovinci, supra, is not in conflict with the Court of Appeals holding in the present case because the Court of Appeals for the Second Circuit has declared that it did not rule on the jury trial issue in that case. In *Katsaros v. Cody*, 744 F.2d 270 (2d Cir.), *cert. denied*, 105 S. Ct. 565 (1984), the Second Circuit held that the lower court's jury trial holding in *Pollock v. Castrovinci, supra*, was moot at the time of the affirmance of the case by the Court of Appeals. 744 F.2d at 278-79. *Pollock v. Castrovinci* therefore has no precedential effect with respect to the jury trial issue.

In *Blau v. Del Monte Corp., supra*, the Court of Appeals for the Ninth Circuit held that the District Court did not abuse its discretion in striking an untimely jury

trial demand. To butress its opinion the Court concluded: "Nor is there an independent constitutional or statutory right to a jury trial in ERISA actions." 748 F.2d at 1347. Accordingly, *Blau v. Del Monte Corp.* presents no conflict with the decision of any other Court of Appeals and indeed is in accord with all of the Courts of Appeals which have considered the jury trial issue. Thus, there is no case from any circuit which conflicts with the Court of Appeals decision in this case.

II. The Findings Of The Trial Judge Were Based On Evidence In The Record And Were Not Clearly Erroneous As Found By The Court of Appeals.

The Court of Appeals, pursuant to Federal Rule of Civil Procedure 52(a) determined there was ample evidence, both documentary and testimonial, to support the factual conclusions of the District Court that there were two pension plans maintained by CF&I, which was the key issue in this case. This factual determination does not warrant discretionary review by this Court.

In an attempt to upset the holding of the Court of Appeals plaintiffs assert that the trial judge took a substantial period of time to render her decision in this case and that therefore the judicial function was not properly performed. The mere passage of time between trial and the rendition of the lower court's opinion does not invalidate the court's findings nor provide a basis to invoke this Court's discretionary power of review.

Plaintiffs also assert that the Court of Appeals ignored the oral testimony and relied instead solely on documentary evidence. Contrary to plaintiffs' assertion the Court of Appeals did not point solely to documentary evidence in affirming the District Court. The Court stated: "Indeed on this record, particularly the documentary evidence, any other finding would lack adequate support" *Turner v. CF&I Steel Corp.*, 770 F.2d 43, 46 (3rd Cir. 1985). It is clear that the Court of Appeals reviewed the

entire record of the proceedings in the District Court and concluded that the findings of the lower court were not clearly erroneous. Review of the factual conclusions of the lower court, approved by the Court of Appeals, is unwarranted.

III. The Determination That CF&I Was Not The Plan Administrator Was Determined As A Fact By The District Court And Found Not To Be Clearly Erroneous By The Court Of Appeals.

In Count II of their Complaint plaintiffs asserted a claim for statutory penalties against CF&I pursuant to §501(c) of ERISA for failure to provide certain pension documents. CF&I moved to dismiss this Count on the ground that it was not the plan administrator, the only person who may be liable for the failure to provide documents under the statute. The District Court, after a review of the factual circumstances, including a stipulation of the parties, determined that CF&I was not the plan administrator and thus could not be held liable for the statutory penalties. The Court of Appeals found that this finding was supported in the record and not clearly erroneous. This factual determination presents no issue of special importance which should be reviewed by this Court.

IV. The District Court Found As A Matter Of Fact That The Program Of Insurance Benefits Was Treated In The Same Manner As The Pension Plans And This Holding Was Determined Not To Be Clearly Erroneous By The Court Of Appeals.

The plaintiffs assert that the increase in insurance benefits which was granted to Master Plan retirees but not to Roebling Plan retirees should be viewed differently than the increases in pension benefits which were given to Master Plan retirees but not to Roebling Plan retirees. The District Court, however, found as a matter of fact

that the increases in insurance benefits were granted in the same way as the increases in pension benefits and that such increases were tied to the pension plans. These findings were also affirmed by the Court of Appeals as not clearly erroneous. Plaintiffs have presented no compelling reason to disturb these findings under Rule 52(a) of the Federal Rules of Civil Procedure and accordingly the Petition for Writ of Certiorari should be denied on this question as well.

CONCLUSION

For the foregoing reasons, respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

Dated: December 6, 1985

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